Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES

October Term, 1998

CLAYTON BRYANT CAVES,
Plaintiff,

vs.

OFFICER MARK LOCKRIDGE,
Respondent,

IN RE FRANK P. HERNANDEZ,
Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I.

WHETHER AN INDIVIDUAL DISTRICT COURT JUDGE ACTING ON HIS OWN INITIATIVE CAN INDEFINITELY SUSPEND AN ATTORNEY FROM PRACTICING BEFORE THE DISTRICT COURT UNDER THE LOCAL RULES OF THE DISTRICT WITHOUT FIRST PROVIDING THE SAME CONSTITUTIONAL DUE PROCESS REQUIRED UNDER THE FEDERAL RULES OF CIVIL PROCEDURE?

II.

WHETHER WHEN A DISTRICT COURT IS CONSIDERING SUSPENSION OR DISBARMENT AS A DISCIPLINARY ACTION EITHER IN THE FORM OF A SANCTION OR CONTEMPT, MUST THE ATTORNEY BE PROVIDED A HEARING AS PART OF THE OPPORTUNITY TO SHOW CAUSE REQUIRED UNDER CONSTITUTIONAL DUE PROCESS?

III.

WHETHER AN INDIVIDUAL DISTRICT COURT JUDGE HAS THE SUBJECT MATTER JURISDICTION TO SUSPEND OR DISBAR AN ATTORNEY?

IV.

WHEN A DISTRICT COURT DETERMINES THAT A DISCIPLINARY ACTION MORE SEVERE THAN ADMONITION, REPRIMAND, OR CENSURE IS WARRANTED, MUST HE REFER THE MATTER TO THE APPROPRIATE DISCIPLINARY AUTHORITIES?

LIST OF PARTIES

All parties to the underlying appeal are set forth in the caption of this matter; however, Frank P. Hernandez, Esq., is the sole party to this Petition for Writ of Certiorari.

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NO. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1998

CLAYTON BRYANT CAVES,
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vs.

OFFICER MARK LOCKRIDGE,
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IN RE FRANK P. HERNANDEZ,
Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE UNITED STATES SUPREME COURT:

Frank P. Hernandez, Esq.[1], petitions for a *writ of certiorari* to review, reverse and vacate the judgment of the United States Court of Appeals for the Fifth Circuit wherein his indefinite suspension from the Northern District Courts by District Court Judge Joe Fish was affirmed.

OPINIONS BELOW

The judgment of the Court of Appeals was issued on August 31, 1998, affirming the judgment of the District court, as relates to Petitioner, Frank P. Hernandez, Esq. The Court of Appeals VACATED and REMANDED as relates to the plaintiff, Clayton Bryant Caves. See Appendix A. The ORDER and JUDGMENT of the District Court was issued on October 7, 1997. See Appendix B. Petitioner's Petition For Rehearing and Suggestion for Rehearing En Banc was DENIED on October 2, 1998. See Appendix C.

JURISDICTION

The jurisdiction of this Court is invoked under its review authority under 28 U.S.C. Secs. 1254(1) and 2101(c). The date of the judgment sought to be reviewed is October 2, 1998. Jurisdiction in the Northern District Court was based on 42 U.S.C. Sec. 1983 and 42 U.S.C. Sec. 1988 and the

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[1] Petitioner was licensed to practice by the State of Texas in September, 1964. Petitioner was admitted to this Court on October 14, 1968. Petitioner argued before this Court for Respondent in *General Telephone Company of the Southwest v. Mariano Falcon*, No. 81-574 (1982). Petitioner has appeared before this Court on several other occasions since 1982. Petitioner was the first Hispanic American judge in the history of Dallas County, Texas. Petitioner has a BV rating by Martindale-Hubbell.

Fourth, Fifth and Fourteenth Amendments to the United States Constitution. Appellate jurisdiction to the Fifth Circuit Court of Appeals was based on 28 U.S.C. Sec. 1291.

APPLICABLE CONSTITUTIONAL, FEDERAL STATUTES, RULES OF THE SUPREME COURT, FEDERAL RULES OF CIVIL PROCEDURE, AND LOCAL RULE PROVISIONS

UNITED STATES CONSTITUTION

Fifth Amendment:

> No Person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Seventh Amendment:

In Suits at common law, where the value in controversy shall exceed twenty dollars the right to a trial by jury shall be preserved, and no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Fourteenth Amendment:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL STATUTES

28 U.S.C. SEC. 1927: Counsel's Liability for Excessive Costs

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct.

RULES OF THE SUPREME COURT

Rule 8: Disbarment and Disciplinary Action

2. After reasonable notice and an opportunity to show cause why disciplinary action should not be

taken, and after a hearing if material facts are in dispute, the Court may take any appropriate disciplinary action against any attorney who is admitted to practice before it for conduct unbecoming a member of the Bar or for failure to comply with these Rules or any Rule or order of the Court.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 1: Scope and Purpose of Rules

These rules govern the procedures in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

Notes of Advisory Committee on Rules 1993 Amendment

The purpose of this revision, adding the words "and administered" to the second sentence, is to recognize the affirmative duty of the court to exercise the authority conferred by these rules to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay. As officers of the court, attorneys share this responsibility with the judge to whom the case is assigned.

Rule 11: Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanctions; Limitations. A sanction imposed for violation of this rule shall be

limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney's fees and other expenses incurred as a direct result of the violation.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

LOCAL RULES FOR THE NORTHERN DISTRICT OF TEXAS

Local Rule 1.1: Definitions

Unless the context indicates a contrary intention, the following definitions apply in these rules:

(a) Court. The word "court" means the district judges of the United States Court of the Northern District of Texas, as a collective body.[2]

Local Rule 11.1(a): Furnishing Copies of Orders and Judgments

Unless the presiding judge otherwise directs, the Clerk shall furnish a copy of each order and judgment to

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[2] Plaintiff's Original Complaint was filed on January 21, 1997. At that time, Local Rule 1.1(a)'s predecessor, Local Rule 1.2: Definitions, (b) defined "Court" as follows: "the word 'Court' means the Judge presiding over a particular case, unless the context indicates a contrary intention." The current local rules became effective April 15, 1997.

counsel of record by first class mail or by facsimile transmission, where the Clerk has the capability to do so.

Local Rule 83.8: Loss of Membership and Discipline of Attorneys

(a) Loss of Membership. Membership in the bar of this court shall be automatically revoked under the following circumstances:

(1) if for any reason other than nonpayment of dues, failure to meet continuing legal education requirements, or voluntary resignation unrelated to a disciplinary proceeding or problem, an attorney loses, either temporarily or permanently, the right to practice law before:

(C) any federal court; or

(b) Grounds for Disciplinary Action. A presiding judge, after giving opportunity to show cause to the contrary, may take any appropriate disciplinary action against a member of the bar for:

(2) failure to comply with any rule or order of this court;

(4) inability to conduct litigation properly;

(c) Appeal of Disciplinary Action. If any attorney's membership in the bar of this court is suspended or revoked, the attorney shall have the right to petition the chief judge of this court for relief. The petition must be filed within 10 days after the discipline is ordered. The chief judge shall have absolute discretion as to what, if any, further action will be taken in respect to the matter.

STATEMENT OF THE CASE

COURSE OF PROCEEDINGS AND OPINIONS BELOW

Plaintiff Clayton Bryant Caves filed his original complaint as a civil rights action in the Northern District of Texas seeking damages caused by Respondent's alleged violation of Clayton Caves' civil rights under 42 U.S.C. Sec. 1983 and 42 U.S.C. Sec. 1988 and the Fourth, Fifth and Fourteenth Amendments to the United States Constitution. During his arrest plaintiff was shot by Defendant Officer Lockridge.

On October 7, 1997, United States District Judge Joe Fish issued an Order appearing to bar Hernandez from practicing before the entire Northern District Court pursuant to Local Rule 83.8(b)(2) and (4) of the Local Rules of the Northern District Court. (R. 52-53). The District Court issued its final judgment holding that the case be "DISMISSED without prejudice and that [Petitioner] Frank P. Hernandez, Esq., should, until further order of this court, be suspended from practice before this court. See Local Rule 83.8(b)(2), (4)." See Appendix B.

Petitioner was not given notice that he was to "personally appear before the undersigned with his client", because the notice was not sent to Petitioner by the District Clerk, but was sent to an attorney who practiced in Washington, D.C., in violation of Local Rule 11.1(a). Local Rule 11.1(a) is at page 4 of this Writ. The August 7, 1997, Order is attached as Appendix D; the September 4, 1997, Order is attached as Appendix E; and, the correspondence, with enclosures to Petitioner from the Washington counsel is

attached as Appendix F.

The Order of suspension was entered after the district court had concluded without any evidence before it that Hernandez was not capable of conducting litigation properly due to his alleged failure to comply with two show cause orders. (R. 52-53). There was no finding by the District Court that Hernandez had acted either willfully or in bad faith. (R. 52-53). The district court also dismissed the underlying case on the merits for the plaintiff's failure to comply with the same show cause orders. (R. 52-53).

Hernandez appealed his suspension to Chief Judge Jerry Buchmeyer under Local Rule 83.8(c) arguing he had not been provided any notice, show cause, or an opportunity to be heard prior to the suspension. (R. 55-103). Chief Judge Buchmeyer dismissed the appeal for lack of jurisdiction on the grounds that he read the order of suspension as only suspending Hernandez from practicing before Judge Fish's court, not the entire Northern District of Texas. (R. 111). See Appendix G.

By its own terms and the definition of the word "court" as set forth in Local Rule 1.1 of the Northern District Courts the Order of suspension purports to suspend Hernandez from the entire Northern District Court, not just Judge Fish's court.[3]

Hernandez and the plaintiff appealed to the Fifth Circuit Court of Appeals. (R. 104-105). On August 31, 1998, a

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[3] Petitioner Hernandez' dilemma is compounded because the open ended suspension is tantamount to disbarment because it has no closing time period. **Suspension** is defined in Black's Law Dictionary, Fifth Ed., pg. 1297, as follows: "A temporary stop, a temporary delay, interruption, or cessation . . . . a temporary cutting off or debarring one, as from the privileges of one's profession."

Panel consisting of Circuit Judges King, Barksdale, and Stewart, vacated and remanded the district court's dismissal of Clayton Caves' case, but upheld the suspension of Hernandez without any meaningful legal discussion of any of the legal arguments made, including whether the district court had violated Hernandez' constitutional rights to due process, and without setting forth a basis for its finding that the district court had not abused its discretion. Said decision was unpublished. See Appendix A.[4]

Hernandez subsequently filed a Petition for Rehearing, and a Suggestion For Rehearing En Banc. The Suggestion for Rehearing En Banc was treated as a Petition for Rehearing which was denied on October 2, 1998. See Appendix B.

STATEMENT OF THE FACTS

The underlying facts of the case of Hernandez' suspension began when he failed timely file a Status Report pursuant to an August 7, 1997 Status Report Order issued by the District Court. Hernandez had in fact timely prepared a Joint Status Report and mailed it to opposing counsel for his

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[4] The paragraph discussing Petitioner's suspension was as follows:

> "Frank P. Hernandez, counsel for Caves, appeals the district court's order, pursuant to N.D. Tex. 83.8(b)(2), (4), suspending him, until further order, from practice before the court for failure to show cause why he should not be held in contempt or otherwise sanctioned. Based upon our review of the record, we hold that the district court did not abuse its discretion in suspending Hernandez until further order. Accordingly, the order of the district court is AFFIRMED."

signature. (R. 88-98). See Appendix O. Opposing counsel signed the Joint Status Report and mailed it back to Hernandez who instead of preparing a cover letter and sending it to the court for filing at that moment placed it in his case file intending to mail it in time to be filed before the deadline of August 28, 1997. (R. 77-78). See Appendix Q. Hernandez, who is a sole practitioner with no support staff, simply forgot to file the prepared and signed Joint Status Report. (R. 78). The district court then issued an Order on September 4, 1997, ordering the parties by September 19, 1997, to show cause why sanctions should not be imposed for the failure to timely file the Joint Status Report. (R. 72-73). Hernandez, who was at the time heavily involved in the readying of a multiple-party securities fraud case before Federal Northern District Judge Mary Lou Robinson and set for September 15, 1997, was "moving too fast," and misread the September 4, 1997, Order understanding it to require the Joint Status Report be filed by September 19, 1997. (R. 78). Hernandez in fact promptly mailed the Joint Status Report, which was filed, on September 12, 1997. (R. 32-34). The Defendant filed a statement showing the Joint Status Report had been timely prepared and mailed back to Hernandez for filing, but because Hernandez had misread the September 4, 1997, Order to show cause this did not trigger any action on his part to explain the delay. (R. 88-89).

When Hernandez failed to file an explanation as ordered the District Court issued a third Order on September 22, 1997, requiring Hernandez to personally appear before the court on October 7, 1997, and to show cause why he should not be sanctioned for failing to comply with the August 7, 1997, and September 4, 1997 Orders. (R. 49-50). Unfortunately,

somehow the District Court's clerk mailed the September 22, 1997, Order requiring Hernandez personally appear and to show cause in an envelope addressed to another lawyer practicing in Washington, D.C., and Hernandez did not receive a copy of this Order or notice of the hearing until October 10, 1997, after the hearing had taken place. He received a copy of the Order from the attorney in Washington, D.C. (R. 79, 83-97). When Hernandez failed to appear to show cause at the scheduled hearing, Judge Fish issued an October 7, 1997, Order of sanction stating "that Frank P. Hernandez, Esq., should, until further order of this court, be suspended from practice before this court." (R. 52-53).

Upon receiving on October 10, 1997, both the Order of suspension and the mis-mailed September 22, 1997, Order to appear and show cause, Hernandez immediately sought a meeting with Judge Fish who denied his request, but instructed Hernandez to write him a letter. (R. 77). On October 15, 1997, Hernandez wrote the suggested letter under penalty of perjury to Judge Fish explaining his actions and informing him of the fact that he had never received notice of the September 22, 1997, Order to show cause as it had been mis-mailed. (R. 77-83) See Appendix N. When these efforts did not resolve the matter, Hernandez filed on October 17, 1997, an appeal from his suspension from practice to Chief Judge Buchmeyer pursuant to Local Rule 83.8(c). (R. 55-103). A copy of this appeal was filed with Judge Fish and included all of the relevant documents in support thereof. Hernandez thereafter met with Chief Judge Buchmeyer regarding his appeal at which time Judge Buchmeyer told Hernandez that the Order of suspension only suspended him from practicing before Judge Fish, and had not suspended or

revoked his membership to the bar of the entire Northern District of Texas. (R. 106). Specifically, Chief Judge Buchmeyer informed Hernandez that after the disbarment of Noemi A. Collie[5], the Judges of the Northern District had met and decided that a single Judge could not disbar an attorney from the entire Northern District Court of Texas. (R. 106). Chief Judge Buchmeyer also informed Hernandez that he was going to be meeting with Judge Fish soon and would discuss the matter with him at that time. (R. 106). On October 28, 1997, Hernandez was informed that his appeal to Chief Judge Buchmeyer was going to be denied due to lack of jurisdiction, but that Judge Fish had indicated to Chief Judge Buchmeyer that Judge Fish wanted Hernandez to contact him. (R. 107). Hernandez again contacted Judge Fish and left word with his secretary as to the reason for the call, but the call was not returned. (R. 107). A second message was left a few days later, but again no return call was received. (R. 107). On November 6, 1997, not having received a written Order from Chief Judge Buchmeyer or a return call from Judge Fish, Hernandez filed a Notice of Appeal and a Statement to the

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[5] Ms. Collie, undersigned counsel herein, had been disbarred by Judge Joe Kendall for her alleged willful refusal to pay monetary sanctions without first providing notice or an opportunity to show cause as to why she should not be disbarred. Collie denied willfully refusing to pay the monetary sanctions. Hernandez was representing Ms. Collie in her appeal from her disbarment and argued the case before the Fifth Circuit Court of Appeals on August 4, 1997 some 60 days before his suspension. Justices JOLLY and DENNIS eventually vacated Ms. Collie's disbarment on May 12, 1998, as having been rendered in violation of her constitutional rights to due process when the district court had failed to provide notice, an opportunity to show cause, or a hearing prior to disbarment. See *Dailey v. Vought Aircraft Company*, 141 F.3d 224 (5th Cir. 1998).

Record supplementing the record with the foregoing events. (R. 104-108). See Appendix P.

On November 17, 1997, Chief Judge Buchmeyer issued an Order of Dismissal on Hernandez' appeal based on his determination that Hernandez had only been suspended from practice before Judge Fish's court and not the entire Northern District Court, and as such, he had no jurisdiction to hear an appeal under Local Rule 83.8(c). (R. 111).

On July 20, 1998, Hernandez filed, as counsel for Noemi A. Collie, Plaintiff's Original Complaint and Jury Demand against Joe Kendall and Jerry Buchmeyer, Civil Action No. 3:98-CV-1678 which was assigned to Judge Fish. In said action Hernandez and Collie have argued that Judges Kendall and Buchmeyer are civilly liable to Collie for the violation of her constitutional rights because the deprivation of notice and opportunity to show cause. The first action of Judge Joe Fish in Collie's case was to deny Collie the right to have Hernandez as her attorney due to his suspension. See Appendix H.

On August 31, 1998, the Fifth Circuit Court of Appeals Panel consisting of Circuit Judges King, Barksdale, and Stewart, rendered its one and one half page decision on Hernandez' appeal without oral argument. See Appendix A. Although it reversed the District Court's decision as to the underlying case, and reinstated it, the Fifth Circuit's decision wholly failed to address Hernandez' arguments that his constitutional right to due process had been violated, and merely stated that based on its review of the record it had found Judge Fish had not abused his discretion. See Appendix A, pg. 2.

Hernandez then filed his Petition for Rehearing and

Suggestion for Rehearing En Banc which was treated as a Petition for Rehearing and denied on October 2, 1998. See Appendix B.

On September 18, 1998, Chief Judge Buchmeyer, being represented by the U.S. Attorney Paul E. Coggins, and Assistant United States Attorney Phillip C. Umphres, filed in the lawsuit brought by Collie, Defendant's Motion for Rule 11 Sanctions and Brief in Support Thereof. See an excerpt from this motion attached hereto as Appendix I. In said document Chief Judge Buchmeyer states through his attorney, but with his full knowledge under Rule 11, that Hernandez should be sanctioned for his having brought the Collie lawsuit knowing he had been suspended from the Northern District of Texas Courts.

Hernandez subsequently filed an Emergency Appeal, Due to New Evidence, to the Chief Judge Under Local Rule 83.8(c) in his own case. In said Emergency Appeal Hernandez points out the inconsistent positions of Chief Judge Buchmeyer in Collie's case and that of Hernandez' case as to whether he was suspended from the entire Northern District Court of Texas or merely Judge Fish's courtroom, and again asks for relief from the Order of suspension and for a hearing. Because of his involvement in the Collie lawsuit, Chief Judge Buchmeyer recused himself from hearing the Emergency Appeal and assigned it to Judge Fitzwater who on October 1, 1998 issued an order refusing to accept jurisdiction because of the then pending Petitioner's Petition for Rehearing. See Appendix J. In said order, at footnote 4, Judge Fitzwater noted that Judge Fish might want to reconsider his position in regard to Hernandez in light of the Fifth Circuit's ruling in *Dailey v. Vought Aircraft Company*, 141 F.3d 224 (5th Cir.

1998).

To date Hernandez has never been provided notice of the show cause hearing which led to his suspension and has never been provided a hearing prior to his suspension, or since.

Hernandez is still suspended in Judge Fish's court and has been denied the right to represent at least two clients[6] whose cases have been filed by him and then assigned to Judge Fish's court since the complained of suspension. Additionally, Hernandez is currently being threatened with further sanctions in another Northern District Judge's court for allegedly continuing to practice in the Northern District Court knowing himself to have been suspended from the entire Northern District Court of Texas. See Appendix K.

Hernandez, in an attempt to understand his position as an attorney in the Northern District of Texas Courts, requested of all of the judges of the Northern District of Texas their position on his ability to practice in their courts. See Appendix L. To date only one judge, Judge Terry Means, has replied advising Hernandez that he can continue to practice in his court. See Appendix M.

REASONS FOR GRANTING THE WRIT

Unless this Court grants this Writ of Certiorari a well recognized and well respected civil rights attorney will have been effectively disbarred from the federal practice of law as a result of an unconstitutional and unilateral order entered by a single district judge. This severe administrative act has already forever tarnished Petitioner's legal reputation. Former

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[6] Those clients are Noemi A. Collie and Clayton Bryant Caves.

Chief Judge of the Northern District of Texas, the Honorable Barefoot Sanders, in his Memorandum Opinion and Order in *In Re: Ronald R. Payne*, Misc. No. 3:94-MC-45-H, Northern District of Texas, recognized the importance of such an order when he wrote:

> "Such censure by a United States District Judge, spread upon a public record, can permanently tarnish a lawyer. As one distinguished commentator on sanctions has aptly noted:
>
> Judges are prone to forget the sting of public criticism delivered from the bench. Such criticism, while potentially constructive can also damage a lawyer's reputation and career. The judge should take care, therefore, that what is said is commensurate with the violation. There is a distinction between bad practice and lack of integrity. Being guilty of the former does not invariably justify a charge of the latter. . . . Judge William W. Schwarzer, 104 F.R.D. 181, 201 (1985)."

Whether Judge Fish's act of indefinite suspension was taken in the heat of anger or not is not known as there is nothing in the record that communicates the explanation for the judge's action. However, Judge Fish's continued refusal to correct his error even after being informed of the law and the facts creates the impression that there is some form of personal prejudice or bias motivating the court's actions. Regardless of his motivation, his illegal action continues to damage Petitioner and his clients. If this Court does not grant this writ then Petitioner will continue indefinitely to be suspended from the practice of law in some federal courts as a result of a failure to timely file a joint status report. Additionally,

Petitioner may be disbarred from practicing in this Court. Rules of Supreme Court, Rule 8.1.

The removal of Petitioner from the practice of federal civil rights law will deprive a segment of our society of competent legal representation on important social issues when such representation is already difficult to obtain. Petitioner recognizes that Judge Fish's actions do not and have not impeded his ability to practice law in state court, yet.

SPECIFIC LEGAL REASONS FOR GRANTING THE WRIT

1. A United States Court of Appeals, the Fifth Circuit, has entered a decision in conflict with the decisions of all other United States Court of Appeals on this same important matter in that it has refused to vacate an order that is void for lack of constitutional due process.

2. A United States Court of Appeals, the Fifth Circuit, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power in that it has refused to vacate an order that is void for lack of constitutional due process.

3. A United States Court of Appeals, the Fifth Circuit, has decided an important question of federal law that has not been, but should be, settled by this Court, that is, whether a court contemplating suspension or disbarment of an attorney pursuant to a Local Rule is required to provide due process equal to that required by the Constitution of the United States.

4. A United States Court of Appeals, the Fifth Circuit, has decided an important federal question in a way that conflicts with relevant decisions of this Court in that it has

refused to vacate an order which is void for lack of constitutional due process.

This is a case of first impression because a federal district judge is relying upon a Local Rule to sanction an attorney with sanctions beyond what the Federal Rules of Civil Procedure and well established Constitutional, Supreme Court, and all Circuit Court law allows.[7]

This is not a Rule 11 case. This is not a 28 U.S.C. Sec. 1927 case. This is not an inherent powers case.[8] The sanctions imposed by Judge Fish rely on the Local Rules of the Northern District of Texas which provide for penalties beyond those allowed under Rule 11, and under 28 U.S.C. Sec. 1927, or under the inherent powers of a Federal District Court. Federal district courts are bound by the disciplinary rules they implement. *Matter of Thalheim*, 853 F.3d 383, 386, 388 (5th. Cir. 1988). *Dailey*, supra, concluded that the only logical reading of the local rule in question requires notice and an opportunity to be heard before an attorney is disciplined by the court, and any ambiguity in the rule must be construed in favor of the attorney being charged with behavior warranting discipline. *Dailey*, 141 F.3d at 230 citing *United States v. Brown*, 72 F.3d 25, 29 (5th Cir. 1995); *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1864)("Parties whose

---

[7] When sanctions are imposed under Rule 11(c)(1)(B) by a district court on its own initiative, neither the award of attorney's fees nor the suspension from practice before the court constitute a valid sanction.*Thornton v. General Motors Corp.*, 136 F.3d 450 (5th Cir. 1998).

[8] Even if this were an inherent powers case, the Court's inherent powers do not extend "to the unilateral suspension of an attorney from an entire judicial district." *In Re See*, SC RI 1994 WL 12713 (S.D. Tex. 1996).

rights are to be affected are entitled to be heard; and in order that they may enjoy this right they must first be notified.").

STANDARD OF REVIEW

Sanctions imposed against an attorney by a District Court are reviewed for abuse of discretion. *U. S. v. Brown*, 72 F.3d at 28 citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S.Ct. 2132, 115 L.Ed.2d 27 (1991). That discretion is abused if the ruling is based on an "erroneous view of the law or on a clearly erroneous assessment of the evidence." *Brown*, 72 F.3d at 28. The Fifth Circuit has specifically found that a district court's power to discipline attorneys does not justify the district court's failure to follow the very rules it created in order to wield such power. *Thalheim*, 853 F.2d at 388. The level of formality of the notice and the proceedings correspond with the level of sanctions imposed. *American Airlines, Inc. v. Allied Pilots Ass'n.*, 968 F.2d 523, 530 (5th Cir. 1992). Furthermore, the district court may not suspend an attorney without "clear and convincing evidence sufficient to support the finding of one or more violations warranting this extreme sanction." *In Re Medrano*, 956 F.2d 101, 102 (5th Cir. 1992). When a district court does finds that a disciplinary sanction more severe than admonition, reprimand or censure is warranted, it should refer the matter to the appropriate disciplinary authorities. *Thornton*, 136 F.3d at 455.

PETITIONER WAS DENIED CONSTITUTIONAL DUE PROCESS

In this case the Fifth Circuit based its decision on both an erroneous view of the law and a clearly erroneous assessment of the evidence. Further, there was not any clear

and convincing evidence before the court sufficient to support the finding of suspension. In this case the level of formality of the notice and proceedings which occurred do not fulfill the level of formality which should be required when imposing the most severe possible sanction of suspension or disbarment. Judge Fish, when he determined that the sanctions that he was imposing were more severe than an admonition, reprimand or censure, should have referred this matter to the appropriate State Bar of Texas disciplinary authorities.[9]

Judge Fish, by acting on his own initiative, has a greater responsibility to ensure that Petitioner's constitutional due process rights were protected. Sanctions such as disbarment and suspension are adversarial and quasi-criminal proceedings in nature. *In Re Ruffalo*, 390 U.S. 544, 551 (1968); *Brown*, 72 F.3d at 29; *In Re Medrano*, 956 F.2d at 102. As such, "an attorney is entitled to procedural due process which includes notice and an opportunity to be heard" prior to any disbarment or suspension proceeding. *Dailey*, 141 F.3d at 229 ((citing *Ruffalo*, 390 U.S. at 550; *Ex Parte Bradley*, 74 U.S. (7 Wall.) 364, 375 (1868); *Medrano*, 956 F.2d at 102; *NASCO, Inc. v. Calcasieu Television and Radio, Inc.*, 894 F.2d 696, 706-07 (5th Cir. 1990), *aff'd sub nom., Chambers v. NASCO*, 501 U.S. 32 (1991); *Standing Comm. on Discipline v. Ross*, 735 F.2d 1168, 1170 (9th Cir.), *cert. denied*, 469 U.S. 1081 (1984)); *see also Childs v. State Farm Mut. Auto, Inc, Co.*, 29 F.3d 1018, 1027 (5th Cir. 1994); *Thornton*, 136

[9] In *Love v. State Bar of Texas*, Feb.1998 1998 WL 86000; Dec. 1998 1998 WL 879712 (Ct. App. - Houston, 1998) the court held that "there is no provision under Texas Rules of Disciplinary Procedure providing the district court with general jurisdiction over disciplinary proceedings."

F.3d at 455 (finding not only notice and opportunity to show cause is required before sanctions can be imposed, but that notice of specific grounds for contemplated action be given before imposing sanctions); *Simmerman v. Corino*, 27 F.3d 58, 64 (3rd Cir. 1994)("party sought to be sanctioned is entitled to particularized notice including, at a minimum . . . (2) the reasons why sanctions are under consideration, and (3) the form and severity of sanctions under consideration."); *Theard v. United States*, 354 U.S. 278, 282 (1957); *Ex Parte Robinson*, 86 U.S. (19 Wall.) 505, 511 (1873); *Ex Parte Garland*, 71 U.S. (32 How.) 333, 378 (1866); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 354 (1871).

Furthermore, Local Rule 83.8(b)(2) and (4) require an attorney be provided similar procedural due process whenever disciplined by a District Court. The rule provides:

> (b) Grounds for Disciplinary Action. A presiding judge, **after giving opportunity to show cause to the contrary**, may take any appropriate disciplinary action against a member of the bar for:
>
> (2) failure to comply with any rule or order of this court;
>
> (4) inability to conduct litigation properly.

N. Dist. Tex. R. 83.8(b)(1997)(emphasis added).

In light of the constitutional due process requirements necessary before a court can deprive an attorney of his property interest, this rule can clearly only be interpreted to require at a minimum the same due process requirements set forth by the Constitution of the United States. Any ambiguity in the rule must be construed in favor of the attorney charged with behavior warranting discipline. *Brown*, 72 F.3d at 29; *Baldwin*, 68 U.S. (1 Wall.) at 233. Since the Constitution of the United States requires a jury trial in the case of a criminal proceeding, at a minimum an attorney should be entitled to a

hearing before he can be deprived of his right to practice law.[10]

This Court requires reasonable notice and an opportunity to show cause why disciplinary action should not be taken, and a hearing if material facts are in dispute, before it can discipline an attorney admitted to practice before it for conduct unbecoming a member of the bar or for failure to comply with its Rules or Orders. Supreme Court Rules, Rule 8.

The record is clear and unambiguous that Hernandez was suspended from practice before at least part of the Northern District Court of Texas without first being provided reasonable notice or an opportunity to be heard, and without a hearing to determine the disputed fact as to whether Hernandez had received notice of the September 22, 1997, Order to show cause and to appear.

It might be argued that Hernandez has been provided the opportunity to show cause via his unsuccessful appeal to Judge Fish, Chief Judge Buchmeyer, and the Fifth Circuit Court of Appeals, but Hernandez' unsuccessful attempts at appeal did not repair the fact that his constitutional right to due process was violated. See *Dailey*, 141 F.3d at 230; *Johnson v. Waddell & Reed, Inc.*, 74 F.3d 147 (7th Cir. 1996)(court's procedure of giving attorney after-the-fact opportunity to convince court to set aside rule violation it had already determined and imposed sanctions for did not comply with either the letter or spirit of the law); *Childs*, 29 F.3d at 1027; and *Cole v. Arkansas*, 333 U.S. 196, 201-202 (1948)(mere opportunity unsuccessfully to bring due process violation to attention of discretionary appellate forum does not constitute

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[10] The State Bar of Texas procedures to disbar or suspend an attorney provide for the attorney to have a jury trial on the issue of suspension or disbarment.

notice and opportunity to be heard that is required by the Due Process Clause of the Constitution).[11]

The Order of suspension entered by the District Court in this case is clearly void as a matter of law due to the failure to provide Hernandez his constitutional right to due process in the form of notice and opportunity to show cause and the requested hearing. See *Dailey*, 141 F.3d at 229-231; *see also Burkett v. Chandler*, 505 F.2d 217, 222, n. 5 (10th Cir. 1974), *cert. denied* 423 U.S. 876 (1975). Both the District Court and the Court of Appeals for the Fifth Circuit have denied Hernandez his constitutional rights and continue to do so despite being informed of the clearly established law with regard to an attorney's rights before he can be suspended or disbarred.

THIS COURT SHOULD UTILIZE ITS SUPERVISORY POWER TO RIGHT THIS WRONG

The Fifth Circuit's unpublished opinion affirming the District Court's actions by way of its failure and refusal to correct the clear repeated deprivation of Hernandez' constitutional rights by the District Court is so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

To allow such clear deprivation of constitutional rights to go uncorrected will drive a nail through the very heart of the judicial system because it will say to the Judges of said system that they can arbitrarily ignore the constitutional protections provided its attorneys with impunity. But for these built in

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[11] This issue was very thoroughly explained by the Fifth Circuit in *Dailey* 141 F.3d at 230.

checks and balances, justice could and will be too easily abused by those willing to do so for political and personal reasons. Attorneys are entitled to an expectation that the courts before which they practice will follow their own disciplinary rules and that the Constitution of the United States will be upheld. *Matter of Thalheim*, 853 F.2d 383, 388 (5th Cir. 1988). Being denied said expectation will only prevent their ability to independently advocate their clients' interests, and serve no other purpose other then to diminish and ultimately destroy the public's confidence in the fairness and legitimacy of the judiciary.

THE SEPTEMBER 22, 1997 ORDER IS CONSTITUTIONALLY INFIRM

Hernandez points out in support of this Petition, that even had Hernandez been given notice of the September 22, 1997, show cause order and failed to appear, the District Court would still have had to give Hernandez notice of its intent to suspend him prior to doing so under Fifth Circuit law. See *Thornton*, 136 F.3d at 455 ("Furthermore, when a district court finds that a disciplinary sanction more severe than admonition, reprimand, or censure under Rule 11 is warranted, it should refer the matter to the appropriate disciplinary authorities. *See* Fed. R. Civ. P. 11 advisory committee notes to the 1993 Amendments. Thus, in this case, even if the notice and due process requirements of Rule 11(c)(1)(B) had been followed, the order suspending Strauss from practice and the award of attorney's fees imposed on Strauss would have been improper.") This was not done.

Furthermore, even had the Order of suspension not been void for violation of Hernandez' constitutional rights of due

process, it was still an abuse of discretion because the District Court failed to make any finding of some act on the part of Hernandez beyond mere negligence which would constitute intentional deceit or bad faith. See *Maguire Oil Co., et al. v. City of Houston*, 143 F.3d 205, 209 (5th Cir. 1998). Bad faith in the sanctions context means subjective bad faith. *See Sussman v. Bank of Isreal*, 56 F.3d 450, 459-60 (2nd Cir.), *cert. denied*, 116 S.Ct. 305 (1995). There is no such finding in the record before this Court, nor are there facts from which such deceit or bad faith could be inferred. When the sanctions ruling was issued Judge Fish had no evidence before him. All he knew was that he had ordered Hernandez to appear before him. He knew that he had failed to appear, but he made no inquiry as to why he had failed to appear. Such action by Judge Fish violated Fed. R. Civ. P., Rule 1. He certainly did not know that the District Clerk's office had made a mistake and sent his previous order to the wrong attorney. The October 7, 1997, order of suspension received by Hernandez on October 10, 1997, was also the first notice to Hernandez of the form and severity of sanctions that the district court was considering.

Assuming there had been no violation of Hernandez' constitutional rights, to suspend him from the Northern District Court of Texas indefinitely was far too severe a punishment for his delay in filing a Joint Status Report which had in fact been prepared but not filed, and for his failure to explain such delay. Hernandez has now suffered the stigma of suspension for over a year due to a relatively minor unintentional infraction in the overall range of possible acts of misconduct. Such punishment under these facts is wholly sufficient to have punished any alleged act of misconduct on

Hernandez' part.

A LOCAL RULE DOES NOT SUPERSEDE A FEDERAL RULE OF PROCEDURE

Since Rule 11, 28 U.S.C. Sec. 1927 and the court's inherent powers do not permit a district judge to unilaterally suspend or disbar an attorney, the Local Rule for the Northern District of Texas relied upon by Judge Fish can not be the basis for the sanction of indefinite suspension from the Northern District Court of Texas.

A Local Rule can not create powers or authority in the court beyond what the constitution, federal rules and case law provide. Therefore, Local Rule 83.8 of the Northern District Court of Texas, to the extent it allows a single district judge to indefinitely suspend or disbar an attorney from practicing in the federal system, is unconstitutional.

A DISTRICT JUDGE DOES NOT HAVE SUBJECT MATTER JURISDICTION TO SUSPEND OR DISBAR AN ATTORNEY

When the District Court failed to provide Hernandez his constitutional due process rights by failing to give notice or an opportunity to be heard in any form, it immediately lost subject matter jurisdiction. The constitutional due process rights in the form of notice and an opportunity to defend provided by the Fourteenth Amendment and other well established constitutional rights are substantive rights or matters of substance going to jurisdiction rather than mere matters of procedure or form which do not go to jurisdiction. *Frank v. Mangum*, 237 U.S. 309, 331 (1915); *Johnson v. Zerbst*, 304 U.S. 458, 467 (1938). The necessity of

providing notice and opportunity to be heard is not a matter left to the judge's discretion or determination, but an express limitation on the subject matter jurisdiction of all courts. *See Ex Parte, Commonwealth of Virginia*, 100 U.S. 348-349 (1880). While the extent and manner in which notice and opportunity to be heard are given may be a procedural matter left to the court's judicial regulation so long as there is adequate notice and opportunity to be heard, without any notice or opportunity to be heard there is no jurisdiction vested in the court. As such, it is argued constitutional due process, as regards the basic requirement that notice and opportunity to be heard be provided, is a jurisdictional prerequisite to the court's subject matter (substantive) jurisdiction being invoked. *See Frank*, 237 U.S. at 331; *Johnson*, 304 U.S. at 467. Any failure of the district court to meet this prerequisite causes it to lose subject matter jurisdiction or to act in the clear absence of all jurisdiction with no authority.

Furthermore, the District Court did not have subject matter jurisdiction on the issue of the indefinite suspension of Hernandez because federal judges do not have subject matter jurisdiction over the state action of suspending or disbarring an attorney. *See Marathon Oil Co. v. Ruhrgas, A.G.*, 115 F.3d 315 (5th Cir. 1997). The administrative act of indefinite suspension or disbarment can only be performed by the State Bar of Texas acting through its disciplinary committee after providing the attorney full constitutional due process. District and appellate courts should refer disciplinary matters requiring indefinite suspension or disbarment to the State Bar Association. *See* Fed. R. Civ. P. 11 Advisory Committee Notes to the 1993 Amendments; *Dondi Properties Corp. v. Commerce Savings*, 131 F.R.D. 284 (N.D. of Texas,

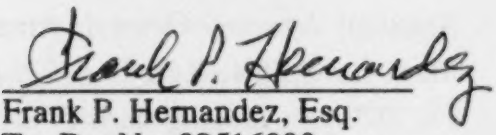
1988)(*en banc*);*State, ex rel White v. Bradley*, 956 S.W.2d 725 (Ct. App. - Ft. Worth, 1997).[12]

CONCLUSION

For these reasons, Petitioner would respectfully request this Court reverse and vacate the Fifth Circuit's decision affirming the Order of suspension and the district court's Order of suspension.

Respectfully submitted,

Frank P. Hernandez, Esq.
716 Wayne Street
Dallas, Texas 75223
(214) 821-1213
(214) 821-1214 (fax)



Frank P. Hernandez, Esq.
Tx. Bar No. 09516000

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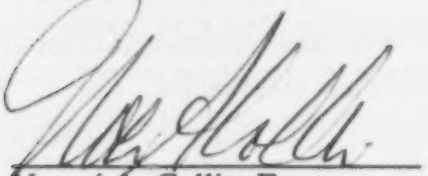
[12] *Dondi*, a case that is required reading in the Northern District that instructs attorneys how to act, holds at page 290:

> "Except in those instances in which an attorney's conduct prejudicially affects the interests of a party opponent or impairs the administration of justice, adjudication of alleged ethical violations is more appropriately left to the grievance committee constituted for such purposes. Deferring to such bodies permits proper resolution of attorneys' conduct while at the same time relieving courts of deciding matters which are unrelated or at most peripheral to the cases before them."

Noemi A. Collie, Esq.
434 W. 12th Street
Dallas, Texas 75208
(214) 942-6812
(214) 942-6818 (fax)

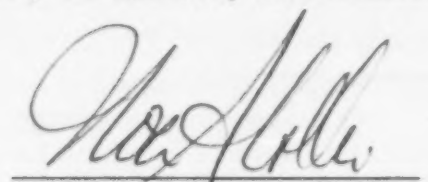


Noemi A. Collie, Esq.
Tx. Bar No. 04589100

[Counsel of Record]

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Petition for Writ of Certiorari has been served on Mr. Richard D. Naylor, Esq., Assistant Attorney General, Attorney for Defendant, Officer Mark Lockridge, P.O. Box 12548, Capitol Station, Austin, Tx. 78711 by placing same in the United States mail, postage prepaid and properly addressed, this 30th day of December, 1998.



Noemi A. Collie, Esq.

Appendix A - 1

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 97-11255
Summary Calendar

CLAYTON BRYANT CAVES,
Plaintiff-Appellant,

FRANK P. HERNANDEZ,
Appellant,

VS.

OFFICE MARK LOCKRIDGE,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(3:97-CV-118-G)

Before KING, BARKSDALE, and STEWART, Circuit Judges.

PER CURIAM:[1]

This appeal concerns sanctions resulting in the dismissal of Caves' action and the suspension of his counsel. "We review the district court's imposition of sanctions and dismissal of Plaintiff's case for abuse of discretion." *Gonzalez v. Trinity Marine Group, Inc.*, 117 F.3d 894, 897

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[1] Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

(5th Cir. 1997)(citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 55 (1991)).

Clayton Bryant Caves appeals the district court's dismissal, pursuant to Fed. R. Civ. P. 16(f), of his civil rights action for failure to timely file a joint status report. Because the limitations period will bar reprosecution of at least some of Caves' claims, the dismissal is tantamount to a dismissal with prejudice. *See Berry v. CIGNA/RSI-CIGNA*, 975 F.2d 1188, 1191 (5th Cir. 1992); *Henson-El v. Rogers*, 923 F.2d 51, 52 (5th Cir.), *cert. denied*, 501 U.S. 1235 (1991); Tex. Civ. Prac. & Rem. Code Ann. Sec. 16.003 (West 1991). The district court did not consider alternatives to the dismissal; accordingly, the district court's order is VACATED, and the case is REMANDED for the district court to determine whether a lesser sanction would serve the interests of justice. *See Bann v. Ingram Micro, Inc.*, 108 F.3d 625, 627 (5th Cir. 1997); *SEC V. First Houston Capital Resources Fund, Inc.*, 979 F.2d 380, 381-82 (5th Cir. 1992).

Frank P. Hernandez, counsel for Caves, appeals the district court's order, pursuant to N.D. Tex. R. 83.8(b)(2), (4), suspending him, until further order, from practice before the court for failure to show cause why he should not be held in contempt or otherwise sanctioned. Based upon our review of the record, we hold that the district court did not abuse its discretion in suspending Hernandez until further order. Accordingly, the order of the district court is AFFIRMED.

Hernandez also challenges N.D. Tex. R. 83.8(a) as unconstitutional. He was not suspended pursuant to that subsection of N.D. Tex. R. 83.8. This court has no jurisdiction to consider this contention, because Hernandez has not presented a justiciable controversy. *See Middle South*

Appendix A - 3

Energy, Inc. v. City of New Orleans, 800 F.2d 488, 490 (5th Cir. 1986).

AFFIRMED in part; VACATED and REMANDED in part.

Appendix B- 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CLAYTON BRYANT CAVES,	*	
	*	
Plaintiff,	*	
	*	
VS.	*	CIVIL ACTION NO.
	*	3:97-CV-0018-G
OFFICER MARK LOCKRIDGE,	*	
	*	
Defendant.	*	

ORDER

A hearing was scheduled for Tuesday, October 7, 1997 at 4:00 p.m. to enable plaintiff and his counsel "to show cause, if any they have, why they should not be held in contempt or otherwise sanctioned for failure to comply with the orders of August 7, 1997 and September 4, 1997." Order of September 22, 1997 at 2. Neither plaintiff nor his counsel appeared on that date at the appointed time. The court therefore concludes that they have no cause to show why they should not be sanctioned.

Accordingly, it is the opinion of the court that this case should be DISMISSED without prejudice and that Frank P. Hernandez, Esq., should, until further order of this court, be suspended from practice before this court. *See* Local Rule 83.8(b)(2), (4).

SO ORDERED.

October 7, 1997.

/S/
A. Joe Fish
United States District Judge

Appendix C - 1

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 97-11255
Summary Calendar

CLAYTON BRYANT CAVES,
Plaintiff-Appellant,

FRANK P. HERNANDEZ,
Appellant,

VS.

OFFICE MARK LOCKRIDGE,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas, Dallas

On Petition for Rehearing
and Suggestion for Rehearing En Banc

(Opinion 8/31/98, 5 Cir., ____, ____ F.3d ____)

Before KING, BARKSDALE and STEWART, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (Fed. R. App. P. and 5th Cir. R. 35) the Suggestion for Rehearing En Banc is also DENIED.

Appendix C - 2

ENTERED FOR THE COURT:

/S/
United States Circuit Judge

Appendix D - 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CLAYTON BRYANT CAVES,	*	
	*	
Plaintiff,	*	
	*	
VS.	*	CIVIL ACTION NO.
	*	3:97-CV-0018-G
OFFICER MARK LOCKRIDGE,	*	
	*	
Defendant.	*	

STATUS REPORT ORDER

In accordance with Rule 16(b), F. R.Civ.P., counsel are directed to confer for the purpose of submitting a JOINT status report in this case.

No meeting under Rule 26(f), Fed. R. Civ. P., as amended ("Rule 26(f)"), is required. Also, the parties are not required to submit a written report to the court outlining a proposed discovery plan. *See* Rule 26(f).

However, when the parties confer for the purpose of submitting a joint status report in this case, they shall discuss their views and proposals concerning the issues contained in Rule 26(f)(2) - (4).

The report shall be FILED (not mailed) no later than **August 28, 1997** (21 days from the date of this order) and shall address in separate paragraphs each of the following matters:

(1) A brief statement of the nature of the case, including the contentions of the parties.

(2) Any challenge to jurisdiction or venue.

(3) Any pending motions.

(4) Any matters which require a conference with the court.

(5) Likelihood that other parties will be joined.

(6) (a) An estimate of the time needed for discovery, with reasons, and (b) a specifications of the discovery contemplated.

(7) Requested trial date, estimated length of trial, and whether jury has been demanded.

(8) Whether the parties will consent to trial (jury or non-jury) before a United States Magistrate Judge per 28 U.S.C.A. Sec. 636(c).

(9) Prospects for settlement, and status of any settlement negotiations.

(10) What form of alternative dispute resolution (e.g., mediation, arbitration, summary jury trial) would be most appropriate for resolving this case and when it would be most effective (e.g., before discovery, after limited discovery, at the close of discovery).

(11) Any other matters relevant to the status and disposition of this case.

Any difference between counsel as to the status of any of the above matters must be set forth in the report.

Plaintiff's counsel is responsible for initiating the status conference and for filing the status report. All counsel must participate in the conference.

Failure to timely submit the status report may result in

the imposition of sanctions, including dismissal without further notice. *See* Rule 16(f), Fed. R. Civ. P.

Unless otherwise stipulated or directed by order, the disclosures required by Rule 26(a)(1), Fed. R. Civ. P., as amended, must be made within 30 days of the date of this order.

All questions regarding this order or any scheduling matters should be directed to Ms. Eleanore Piwoni (767-0774).

SO ORDERED.

August 7, 1997.

/S/
A. Joe Fish
United States District Judge

Appendix E - 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CLAYTON BRYANT CAVES,	*	
	*	
Plaintiff,	*	
	*	
VS.	*	CIVIL ACTION NO.
	*	3:97-CV-0018-G
OFFICER MARK LOCKRIDGE,	*	
	*	
Defendant.	*	

ORDER

On August 7, 1997, the court issued a status report order requiring the parties to confer and to report **JOINTLY** in writing certain information about their dispute. That order stated that "failure to timely submit the status report may result in the imposition of sanctions, including dismissal without further notice. *See* Rule 16(f) Fed. R. Civ. P."

To date, no joint status report has been filed. By **September 19, 1997**, each party shall show cause in writing why sanctions should not be imposed.

SO ORDERED.

September 4, 1997.

/S/
A. JOE FISH
United States District Judge

Appendix F - 1

HOGAN & HARTSON
L.L.P.

COLUMBIA SQUARE
555 THIRTEENTH STREET, N.W.
WASHINGTON, DC 20004-1109
TEL (202) 637-5600
FAX (202) 637-5910

October 7, 1997

Frank P. Hernandez, Esq.
Law Office of Frank P. Hernandez
716 Wayne
Dallas, Texas 75223

Re: Clayton Bryant Caves v.
Officer Mark Lockridge

Dear Mr. Hernandez:

A copy of this enclosed Order was mailed to our office by mistake. I am forwarding it to you for your records.

Sincerely,

/S/

Peggy E. Gelinas
Secretary to Edward C. Duckers

Enclosures

Appendix F - 2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CLAYTON BRYANT CAVES,	*	
	*	
Plaintiff,	*	
	*	
VS.	*	CIVIL ACTION NO.
	*	3:97-CV-0018-G
OFFICER MARK LOCKRIDGE,	*	
	*	
Defendant.	*	

ORDER

This case was filed on January 21, 1997. Although summons was issued on that date, the case lay dormant until May 22, 1997, when the court issued an order requiring the plaintiff to show cause by June 9, 1997 why the case should be retained on the docket. On June 6, some 4 1/2 months after suit was commenced, the plaintiff responded to the show cause order, through his counsel, that he had experienced various misadventures in effecting service as the result of false assumptions, mistaken case numbers, and an incorrect understanding of the U.S. Marshal's responsibility to serve process in civil cases. Almost 5 months after suit was filed, a return of service was submitted on June 16 indicating that the defendant had at least been personally served (though not, sad to say, within the 120 days prescribed by Rule 4(m), F.R. Civ. P.).

On August 7, 1997, to fulfill its duties under Rule 16(b), F.R. Civ. P., the court issued a status report order. The order was apparently ignored, in that no response was filed by the due date of August 28, 1997. Thus, on

September 4, the court issued an order requiring the parties to show cause in writing by September 19 why sanctions should not be imposed for failure to comply with the August 7 order.

No cause in writing having been shown by September 19,* counsel for the plaintiff, Frank P. Hernandez, Esq., shall personally appear before the undersigned with his client, Clayton Bryant Caves, in Courtroom Number 15B15, 1100 Commerce Street, Dallas, Texas, on Tuesday, October 7, 1997 at 4:00 p.m. to show cause, if any they have, why they should not be held in contempt or otherwise sanctioned for failure to comply with the orders of August 7, 1997 and September 4, 1997.

SO ORDERED.

September 22, 1997.

/S/
A. JOE FISH
United States District Judge

---

* A joint status report was finally filed, more than two weeks late, on September 12.

Appendix G - 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	*	
	*	3:97-CV-118-G
FRANK P. HERNANDEZ	*	

ORDER OF DISMISSAL

Under Local Rule 83.8(c), the Chief Judge has the authority to review a sanctions order entered by another judge of this Court only if that order suspends or revokes an attorney's membership in the bar of this Court.

The October 7, 1997 Order by the Honorable Joe A. Fish in Caves v. Officer Mark Lockridge, merely suspends Frank P. Hernandez from practice before Judge Fish "until further order."

The Chief Judge is without authority to review sanctions which do not suspend or revoke Mr. Hernandez' membership in the bar of the Northern District. Accordingly, the "Appeal To The Chief Judge Under Local Rule 83.8(c)", filed October 17, 1997, is DISMISSED for want of jurisdiction.

ENTERED: NOVEMBER 17, 1997

/S/
JERRY BUCHMEYER, CHIEF JUDGE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

Appendix H - 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NOEMI A. COLLIE,	*	
	*	
Plaintiff,	*	
	*	
vs.	*	CIVIL ACTION NO.
	*	3:98-CV-1678-G
JOE KENDALL and	*	
JERRY BUCHMEYER,	*	
	*	
Defendant.	*	

ORDER

The original complaint in this case, filed on July 20, 1998, was signed by Frank P. Hernandez, Esq. ("Hernandez") and Noemi A. Collie, Esq. as counsel of record for plaintiff. Hernandez is currently suspended from practicing before this court. *See* Order in *Caves v. Lockridge*, No. 3:97-CV-0118-G (N.D. Tex. October 7, 1997)(copy attached). Accordingly, the plaintiff must, within thirty days of this date, obtain substitute counsel for Hernandez or be prepared to proceed *pro se*.

Furthermore, the clerk shall not, without prior approval from the undersigned, accept further filings from Hernandez in this case.

SO ORDERED.

July 27, 1998.

/S/
A. JOE FISH
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NOEMI A. COLLIE,	*	
	*	
Plaintiff,	*	
	*	
VS.	*	CIVIL ACTION NO.
	*	3:98-CV-1678-G
JOE KENDALL and	*	
JERRY BUCHMEYER,	*	
	*	
Defendant.	*	

III.

RELATIVELY SEVERE SANCTIONS
ARE APPROPRIATE AGAINST BOTH RESPONDENTS

(4) The fact that a party or attorney has been sanctioned more than once has been held to be an aggravating factor. *Smith v. Blue Cross & Blue Shield*, 959 F.2d 655, 660 (7th Cir. 1992). This is not the first sanction action taken against either Respondent. Respondent Hernandez was previously sanctioned by this very court (Hon. A. Joe Fish) within the last year in a case styled *Caves v. Lockridge*, No. 3:97-CV-0118-G (USDC ND TX). In an order dated October 7, 1997, Hernandez was found to be in contempt for failing to comply with court orders and was suspended from the practice of law in the Northern District of Texas until further notice. Aside from the fact that Hernandez has been sanctioned before, an additional aggravating fact is that his filing of the instant lawsuit appears to be a violation of the order in *Caves v. Lockridge*.

Appendix J - 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CLAYTON BRYANT CAVES,	*	
	*	
Plaintiff,	*	
	*	
vs.	*	CIVIL ACTION NO.
	*	3:97-CV-0118-G
OFFICER MARK LOCKRIDGE,	*	
	*	
Defendant,	*	
	*	
IN RE	*	
FRANK P. HERNANDEZ,	*	
	*	
Petitioner.	*	

MEMORANDUM OPINION
AND ORDER

Petitioner Frank P. Hernandez, Esq. ("Hernandez") seeks relief pursuant to N.D. Tex. Civ. R. 83.8(c)[1] by way of emergency appeal from an October 7, 1997, order of Judge Fish suspending Hernandez from practicing in this court until further order. Because the court concludes that Hernandez must first seek relief from Judge Fish before requesting

---

[1] Rule 83.8(c) provides:

> If an attorney's membership in the bar of this court is suspended or revoked, the attorney shall have the right to petition the chief judge of this court for relief. The petition must be filed within 10 days after the discipline is ordered. The chief judge shall have absolute discretion as to what, if any, further action will be taken in respect to the matter.

review by the Chief Judge,[2] and because the pendency of Hernandez' appeal in the Fifth Circuit deprives the court of jurisdiction to grant relief, the court dismisses the appeal.

I.

Judge Fish dismissed the instant case without prejudice on October 7, 1997 because neither Hernandez nor his client appeared as ordered for a show cause hearing, and thus failed to demonstrate cause why they should not be sanctioned for failing to comply with Judge Fish's August 7, 1997 status report order and September 4, 1997 show cause order. *Caves v. Lockridge*, Civil Action No. 3:97-CV-0118-G, order at 1 (N.D. Tex. Oct. 7, 1997)(Fish, J.). Citing N.D. Tex. Civ. R. 83.8(b)(2) and (4),[3] Judge Fish in the same order suspended Hernandez, until further court order, from practice before this court. *Id.* at 2.

Hernandez sought timely review of the order from Chief Judge Buchmeyer, who on November 17, 1997 dismissed the appeal for lack of jurisdiction. Chief Judge Buchmeyer held that Judge Fish had suspended Hernandez only from practicing before Judge Fish; his membership in the

[2] Chief Judge Buchmeyer has assigned Hernandez' appeal to the undersigned because Hernandez represents Noemi A. Collie, Esq., in a suit pending against Judge Kendall and Chief Judge Buchmeyer. *See Collie v. Kendall*, Civil Action No. 3:98-CV-1678-G (N.D. Tex. July 20, 1998). Judge Fish is the presiding judge in that suit.

[3] Rule 83.8(b)(2) and (4) provides:

> A presiding judge, after giving opportunity to show cause to the contrary, may take any appropriate disciplinary action against a member of the bar for:
>
> ***
>
> (2) failure to comply with any rule or order of this court;
>
> ***
>
> (4) inability to conduct litigation properly[.]

bar of the Northern District of Texas was not suspended. *Caves v. Lockridge*, Civil Action No. 3:97-CV-0118-G, order at 1 (N.D. Tex. Nov. 17, 1997)(Buchmeyer, C.J.).

Caves and Hernandez appealed to the Fifth Circuit. The circuit court affirmed the portion of the order that suspended Hernandez from practice before this Court. *Caves v. Lockridge*, NO. 97-11255, slip op. at 2 (5th Cir. Aug. 31, 1998)(per curiam). The panel held, based on its review of the record, that Judge Fish did not abuse his discretion in suspending Hernandez until further order. *Id.* The circuit court vacated the part of the order that dismissed Caves' lawsuit. *Id.* Because at least some of Caves' claims would be time-barred, the dismissal was equivalent to one with prejudice, which required that Judge Fish consider lesser sanctions before concluding that dismissal was warranted. *Id.* Hernandez filed on September 14, 1998 a petition for rehearing and a suggestion for rehearing *en banc*. The petition and suggestion are still pending before the circuit court, which has not issued its mandate.

Hernandez now brings the instant emergency appeal to the Chief Judge based on new evidence.

II.

N.D. Tex. Civ. R. 83.8(b) and (c) concern attorney discipline. Rule 83.8(b) empowers a presiding judge to take appropriate disciplinary action against a member of the court's bar. Rule 83.8(c) authorizes an attorney who membership in the bar has been suspended to appeal to the Chief Judge. The Rule requires that a petition for review of discipline be filed within 10 days after the discipline is ordered. Rule 83.8(c) vests the Chief Judge with "absolute discretion as to what, if any, further action will be taken in respect to the matter." It

mentions nothing about further review or reconsideration after the Chief Judge has acted.

Absent a specific local rule that addresses requests to reconsider disciplinary orders based on newly discovered evidence, the court looks to Fed. R. Civ. P. 60(b)(2), the most closely analogous national rule, for guidance. Rule 60(b)(2) empowers the district court in the first instance, not the circuit court, to grant relief based on newly discovered evidence. A party who seeks but is denied such relief may then appeal to the circuit court. Applying this regimen to the procedure specified in this court's local civil rules, Rule 83.8 would authorize the judge who disciplined the attorney to consider newly discovered evidence. An appeal to the Chief Judge would then be available pursuant to Rule 83.8(c). This is a logical construction of how Rule 83.8(b) and (c), which vests discretion both in the sanctioning judge and the reviewing judge, Rule 60(b)(2) bestows discretion in the district judge, but the circuit court reviews only for abuse of discretion. *See, e.g., RTC v. Kemp*, 951 F.2d 657, 664 (5th Cir. 1992)("This Court reviews a district court's denial of a Rule 60(b)(2) motion for abuse of discretion."). Nevertheless, when an attorney asks that discipline be revisited based on newly discovered evidence, it is more sensible to expect that he first ask the judge who imposed the punishment to reconsider the matter, than to ask the reviewing judge to do so. The court therefore holds that Hernandez must first ask Judge Fish for relief and, failing a favorable ruling, seek timely review of his order. Not only is this course a logical one under the local rules, it coincides with Judge Fish's order, which specifically provides for the possibility that Hernandez's suspension will be lifted by further court

order.[4]

III.

Even if the court were persuaded to grant Hernandez the relief he seeks, it lacks the jurisdiction to do so. It is well settled that the filing of a notice of appeal divests the district court of jurisdiction "with respect to any matters involved in the appeal." *Henry v. Independent Am. Sav. Ass'n*, 857 F.2d 995, 997 (5th Cir. 1988). Following the filing of a notice of appeal,

> although the trial court may thereafter act in aid of the appellate court's jurisdiction, as by *denying* a Rule 60(b) motion . . . it may not *grant* Rule 60(b) relief without remand for such purpose or possibly other permission from the appellate court.

Brown v. United Ins. Co. of Am., 807 F.2d 1239, 1241-42 n. 1 (5th Cir. 1987)(per curiam)(emphasis in original)(citations omitted). Hernandez's appeal is still pending in the Fifth Circuit because he has sought panel rehearing and rehearing *en banc* and the mandate has not issued. The court therefore lacks jurisdiction to disturb Judge Fish's affirmed order.

Hernandez's emergency appeal, due to new evidence, is

DISMISSED.

October 1, 1998.

/S/
SIDNEY A. FITZWATER
UNITED STATES DISTRICT JUDGE

---

[4] Indeed, in light of *Dailey v. Vought Aircraft Co.*, 141 F.3d 224, 229-231 (5th Cir. 1998), Judge Fish may deem reconsideration appropriate in this case.

Appendix K - 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

MARY N. BROOKS,	*	
	*	
Plaintiff,	*	
	*	
VS.	*	CIVIL ACTION NO.
	*	198-CV-0067-C
ZOLTEK CORPORATION,	*	
	*	
Defendant.	*	

MOTION TO STRIKE PLEADINGS
PURSUANT TO FRCP 11 AND LR 2.1(f)

TO THE HONORABLE JUDGE OF SAID COURT:

Defendant, Zoltek, respectfully requests that Plaintiff's Complaint and all other filings be stricken from the record for failing to comply with FRCP 11. Defendant moves this Court for an Order as follows:

1. Strike all papers filed by Frank Hernandez, including Plaintiff's Complaint;

2. Dismiss Plaintiff's lawsuit; and

3. For such other and further relief as the Court deems proper.

Date: November 16, 1998.

/S/

Robert L. Grossman (#38180)
Burk, Seaton & Castle, P.A.
7301 Ohms Lane, Suite 320
Edina, Minnesota 55439
Phone: (612) 896-1700
Fax: (612) 896-1704

Appendix K - 2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

MARY N. BROOKS,	*	
	*	
Plaintiff,	*	
	*	
VS.	*	CIVIL ACTION NO.
	*	198-CV-0067-C
ZOLTEK CORPORATION,	*	
	*	
Defendant.	*	

MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION TO STRIKE

Background Facts

On or about March 19, 1998, attorney Frank P. Hernandez filed a Complaint on behalf of Mary N. Brooks in the United States District Court for the Northern District of Texas, Abilene Division. This Complaint was signed by Frank P. Hernandez only. The Complaint was served on Defendant on June 10, 1998. Because Defendant signed a Waiver of Service of Summons, Defendant's Answer was due on or before August 9, 1998. Defendant served and filed its Answer on August 5, 1998. According to the Court's scheduling Order, all pretrial motions, including motions for summary judgment, must be filed by February 16, 1999.

Plaintiff has not engaged in any discovery. On September 22, 1998, Defendant served on Plaintiff's counsel Defendant's Request for Production of Documents, Interrogatories, and Notice of Taking Deposition of Mary N. Brooks. Defendant's counsel was served with Plaintiff's responses to the discovery requests on November 12, 1998.

Appendix K - 3

Plaintiff's Response to Defendant's Interrogatories and Plaintiff's Response to Defendant's Request for Production of Documents are signed by Frank Hernandez only. Plaintiff's deposition is scheduled for November 19, 1998, but is being postponed pending the outcome of this motion.

On Friday, November 6, 1998, Defendant's counsel received a copy of the materials sent to each of the federal judges, including the presiding judge in this case. In this material is an Order dated October 7, 1997, wherein the Court held that "Frank P. Hernandez, Esq. should until further order of this court, be suspended from practice before this court. See Local Rule 83.8(b)(2), (4)." Affidavit of Robert L. Grossman, Exhibit 3. In July, the Court issued another Order whereby it did not allow Frank Hernandez to file papers while he was still suspended. Order filed July 27, 1998 in Case No. 3:98-CV-1678-G. Affidavit of Robert L. Grossman, Exhibit 4.

Argument

Rule 11 of the FRCP states that every pleading shall be signed by at least one attorney of record. It also states that an unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

Since October 7, 1997, Plaintiff's counsel has known that he is suspended from practicing law in some federal courts. In his October 20, 1998, letter to the Court, Mr. Hernandez states, ""The basic issue as I see it is: Am I authorized to practice before your court as an attorney? Or, put another way, is the suspension (disbarment) issued by Judge Fish applicable only to his court as Judge Buchmeyer ruled on November 17, 1997." Mr. Hernandez apparently

considers the suspension a general disbarment because he goes on to state, "I classify it as a 'disbarment' because it has now been over a year since the 'suspension' and the suspension has no limiting deadline." Affidavit of Robert L. Grossman, Exhibit 2.

The Court has already issued one Order stating that Mr. Hernandez is not allowed to file papers with the federal court while he is suspended. *See* Order filed July 27, 1998, and attached to the Affidavit of Robert L. Grossman, Exhibit 4. While there may be different presiding judges, there nevertheless is only one federal district court. Clearly, in March of 1998, when Mr. Hernandez filed the Complaint in this lawsuit, he was suspended from appearing in this Court. Thus, the papers and Complaint in this case should be stricken from the record and this case dismissed.

It is not known by Defendant or counsel if Plaintiff was aware that her counsel had been suspended from practicing before the federal court. However, Plaintiff's counsel knew of his suspension at the time he filed Plaintiff's counsel waited until one week before the taking of Plaintiff's deposition to disclose his status. As much as Defendant wishes to proceed with discovery, we do not think it is appropriate to proceed based on the current status of Plaintiff's counsel. Since dispositive motions are due by February 16, 1999, the time for processing this case has become very short. The Defendant requests to not only strike the pleadings, but also to dismiss the case without prejudice.

Rule 11 requires that every pleading be signed by at least one attorney of record. Since Frank P. Hernandez is suspended, he cannot be an attorney of record. Therefore, the Plaintiff's Complaint was not properly signed, and Defendant

respectfully requests that the Complaint be stricken and the case dismissed.

Date: November 16, 1998.

/S/
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Appendix L - 1

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October 20, 1998

Chief Judge Jerry Buchmeyer
Northern District of Texas
1100 Commerce, 15th Floor
Dallas, Texas 75242

Judge Mary Lou Robinson
205 E. 5th Ave., Room 226
Amarillo, Texas 79101

Judge A. Joe Fish
1100 Commerce Street
Room 15D6L
Dallas, Texas 75242

Judge Robert B. Maloney
1100 Commerce Street
Room 15E26
Dallas, Texas 75242

Judge Sidney A. Fitzwater
1100 Commerce Street
Room 15A3
Dallas, Texas 75242

Judge Sam R. Cummings
1205 Texas Ave.
Room C-210
Lubbock, Texas 79401

Appendix L - 2

Judge John H. McBryde
501 W. 10th Street
Room 401
Fort Worth, Texas 76102

Judge Barefoot Sanders
1100 Commerce Street
Room 15E6C
Dallas, Texas 75242

Judge George A. Solis
1100 Commerce Street
Room 13A31
Dallas, Texas 75242

Judge Terry R. Means
501 W. 10th Street
Room 201
Fort Worth, Texas 76102

Judge Joe Kendall
1100 Commerce Street
16th Floor
Dallas, Texas 75242

Judge Sam A. Lindsay
1100 Commerce Street
Room 13B31
Dallas, Texas 75242

Dear Judges:

I write this letter to you because I need a clarification from each of you as to what you consider my status as an attorney in the Dallas Division and Fort Worth Division of the Northern District of Texas.

I have enclosed documents that I think are relevant to the issue that faces us in this matter. I am available to speak with each of you by telephone, in person, or by telephone conference, should any of you desire to talk with me about

this issue. However, I would appreciate a response within a reasonable time as this matter is continuing, as are my cases.

The basic issue as I see it is: Am I authorized to practice before your court as an attorney? Or, put another way, is the suspension [disbarment] issued by Judge Fish applicable only to his Court as Judge Buchmeyer ruled on November 17, 1997. [Exhibit 15, Emergency Appeal, Due to New Evidence, To The Chief Judge Under Local Rule 83.8(c)]. I classify it as a "disbarment" because it has now been over a year since the "suspension" and the suspension has no limiting deadline. As pointed out in the Suggestion for Rehearing En Banc the definition of suspension requires a time limitation.

I need to know the answer from each of you individually because in some of the courts I have cases pending and I must take appropriate action if you consider me suspended [disbarred] from the entire Northern District. In those courts that I do not have cases pending I need to know because with my practice, at any given moment, I may be called on to file a case that could be assigned to your court, or may be asked to assist an attorney who has a case pending in your court.

I know that federal judges do not like to be sued. I know, as a former judge myself, that judges do not look kindly on attorneys who sue them or their colleagues. However, I have a strong belief in Ms. Collie's case and I must act on that belief, which is based on current constitutional law. Whether I am correct or not is yet to be determined, but I firmly believe that the issue is a valid issue because the Fifth Circuit upheld our position that Judge Kendall and Judge Buchmeyer violated Ms. Collie's constitutional due process rights when Judge Kendall disbarred her and it was upheld, without due process, by Judge Buchmeyer.

Basically, I am asking each of you to look into your most inner feelings and determine if you can be fair and impartial to my clients and to me. If you can, please advise

me and I will go my normal way in the litigation that is pending or might accrue. If you cannot, please advise me so that I will know and so that I can take appropriate action to protect my client's rights and my rights.

I enclose for your review and information, and so that you will have the relevant documents before you, the following documents:

1. The Emergency Appeal, Due to New Evidence, to The Chief Judge Under Local Rule 83.8(c), which has 19 Exhibits, and Judge Fitzwater's Memorandum and Order entered in this matter.

2. Appellant's Suggestion for Rehearing En Banc, which was not filed because of the size of the appendix, but which has relevant cases and documents.

3. Defendants Kendall and Buchmeyer's Motion for Sanctions Under Rule 11, and Motion to Dismiss filed in the Collie v. Kendall and Buchmeyer case, and plaintiff's reply.

4. Plaintiff's Motion to Transfer Case Out of The Northern District of Texas, Motion to Recuse, and Motion to Stay Orders Suspending Plaintiff's Counsel, and Brief in Support Thereof, filed in the Collie v. Kendall and Buchmeyer case, and Judge Fitzwater's Memorandum and Order.

5. Judge Fish's July 27, 1998 Order not allowing Hernandez to represent Collie in the Collie v. Kendall and Buchmeyer case.

6. Judge Sanderson's order in Dailey v. Vought wherein attorney's for the defendants attempted to take legal advantage of Ms. Collie's situation.

7. Texas Lawyer summary of *Satterwhite v.*

State, 9/23/98, wherein the attorney was charged criminally and sentenced for four and one half years imprisonment, and assessed a $7,500.00 fine.

I am particularly concerned by the *Satterwhite* case because I can imagine a situation wherein opposing counsel, a federal judge, or for that matter a state judge, would attempt to bring criminal charges against me. Although it is clear that I have not acted "knowingly" or with "intent" to violate Judge Fish's Order, I have grave concern as to a court's ability, or an appellate court's ability to apply existing law. My concern comes from the recent ruling in the Caves case wherein the Fifth Circuit panel completely ignored recently decided law applying well established law.

I am sending a copy of this correspondence with the enclosures to all of the attorneys of record in those cases that I do have pending so that they may know of this communication.

Finally, I would appreciate any input that any of you would suggest as to how I might communicate with Judge Fish. He has never responded to my letter. He has never responded to my telephone calls, except for the one he made to me while I was in Fort Worth on the day I appealed to the Fifth Circuit, which I immediately returned to no avail. He will not allow me to file pleadings in his court. I can not appeal to the Chief Judge. Any suggestions would be appreciated.

I appreciate your time and effort in reviewing this matter and advising me of your position.

Sincerely yours,

/S/

Frank P. Hernandez

Appendix M - 1

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
201 UNITED STATES COURTHOUSE
501 WEST 10TH STREET
FORT WORTH, TEXAS 76102

CHAMBERS OF
JUDGE TERRY R. MEANS

Chambers: (817) 978-4207
FAX: (817) 978-4208

November 2, 1998

Mr. Frank P. Hernandez
Attorney at Law
716 Wayne Street
Dallas, Texas 75223

Dear Mr. Hernandez:

Based upon the decision by the Honorable Jerry Buchmeyer, Chief Judge of the Northern District of Texas, that Judge Fish's order applies to your practice before him alone and not before the entire court, with which decision I respectfully disagree, I believe that you are still authorized to practice before me.

Sincerely,

/S/

Terry R. Means

Appendix N - 1

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October 15, 1997

Hon. Joe A. Fish
United States District Judge
Earl Cabell Federal Building
1100 Commerce
Dallas, Texas 75201

Received
October 16, 1997
Nancy Doherty, Clerk
Northern District of Texas

[Hand Delivered]

RE: Clayton Bryant Caves v. Officer Mark Lockridge, 3:97-CV-0118-G

Dear Judge Fish:

I write this letter in accordance with your response to my attempt to visit with you concerning the sanctions you ordered against my client and me.

I want this letter to be an explanation for me not filing the Status Report timely. These statements are not made under oath, but I make them under penalty of perjury.

When I received your Order of August 7, 1997 providing for the status report to be filed by August 28, 1997, I immediately called Mr. Richard D. Naylor, defendant's counsel and we agreed on the issues. On August 13, 1997 I wrote to Mr. Naylor and sent him an original and three copies of the Joint Status Report. I specifically pointed out to him that we were to have the Joint Status Report filed by August 28, 1997, not in the mail by that date. [Exhibit 1].

On August 19, 1997, Mr. Naylor returned to me the original and two copies of the Joint Status Report which he

had approved and signed. I received this letter no later than August 21, 1997. [Exhibit 2]. Certainly with ample time to mail it to the District Clerk to meet the deadline. However, instead of mailing it immediately I placed it in the Clayton Cave file with the intention of filing it timely. As the Court knows that did not happen as I forgot about the filing deadline. This forgetfulness was not intentional, but it was a mistake on my part.

On or about September 8, 1997, I received the Court's September 4, 1997 Order. I misread the Order and did not realize that the Court wanted a written statement as to the reason that I had failed to timely file the Joint Status Report. I read the Order to mean that the parties had until September 19, 1997 to file the Joint Status Report. I mailed the Joint Status Report to the District Clerk and it was filed on September 12, 1997. I most certainly, had I not misread the Order, would have provided the Court with the explanation that I am now providing. When I received the Joint Status Report back in the mail filed I thought the matter had been resolved. In fact, it was so resolved in my mind that when I received Defendant's Advisory to the Court Pertaining To Status Report it did not trigger any action on my part. This, it seems, was because I had misread the initial Order.

In reviewing in my mind why I would misread a Court Order, and particularly an Order from you, I can only determine that since I was in the final trial preparation on a complicated stock fraud case set for trial in Judge Mary Lou Robinson's Court on the September 15, 1997 docket, that I was perhaps "moving too fast" and not being studious enough.

The Court should know, and this is not by way of excuse, that I practice alone from my home and without a secretary so all settings on the calendar are handled by me. I take full responsibility for what occurred.

I did not attend the hearing set by the court on October 7, 1997 at 4:00 p.m. because I was never notified of the setting. My client did not attend for two reasons, first because

since I did not get any notice of the setting he did not get any notice, and second, because he is incarcerated in a Texas prison.

I most certainly would have appeared at the hearing set by the Court had I known of it. In fact, I most probably would have advised the Court in writing as to the circumstances regarding the Joint Status Report so that the Court could then determine if a hearing would be necessary.

On October 10, 1997, I received a copy of the Court's October 7, 1997 Order that was entered on October 8, 1997. This was the first time that I was aware that the Court had set the October 7, 1997 hearing. Also, on October 10, 1997 I received the Court's Judgment. Also, on October 10, 1997, and after I had opened the mail from the District Court, I received and opened the correspondence I had received from Hogan & Hartson, L.L.P. of Washington, D.C. The package contained a cover letter and a copy of the Court's September 22, 1997 letter and a copy of the Court's September 22, 1997 Order, along with cover note from the District court relating to receiving orders by FAX. [Exhibit 3]. This was the second time I had been notified of the October 7, 1997 setting, both notifications coming within minutes of each other. I am making an inquiry of District Clerk Nancy Doherty's office to determine how this happened. It may be that a clerk simply made a mistake and sent the Court Order to the wrong attorney. Since it went to Hogan & Hartson, L.L.P., it seems possible to me that the clerk performing the function somehow mixed up their address with mine since my last name starts with an H. I do not know this for a fact, but I do intend to speak with the District Clerk so that this will not happen in the future. If the Court desires, I will advise the Court of the explanation that I was provided by the District Clerk's office.

The above is what happened as relates to the Joint Status Report and my failure and my client's failure, to appear before you as Ordered to do so on October 7, 1997. I ask that you consider this explanation and request that you review your October 7, 1997 Order that has effectively, under the Local

Rules, suspended me from all practice before all the District Courts in the Northern District. This ultimate sanction, coupled with the ultimate sanction given my client, in my opinion is not a proper sanction under the circumstances, factually or legally.

As the Court is aware, I am willing to meet with the Court personally to discuss this matter.

Sincerely yours,

/S/

Frank P. Hernandez

Appendix O - 1

FRANK P. HERNANDEZ
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August 13, 1997

Mr. Richard D. Naylor, Esq.
Assistant Attorney General
Office of The Attorney General
P.O. Box 12548
Austin, Texas 7871102548

Re: Caves v. Lockridge

Dear Mr. Naylor:

Please find enclosed an original and three copies of the Joint Status Report. Please sign the original and two of the copies and return those three items to me so that I can file the original and one copy with the Court. The other copy is for you.

If you have any questions, please call me. We are to have this filed by August 28, 1997, not in the mail by that date.

Sincerely yours,

/S/

Frank P. Hernandez

encls.

Appendix P - 1

THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CLAYTON BRYANT CAVES,	*	
	*	
Plaintiff,	*	
	*	
VS.	*	CIVIL ACTION NO.
	*	3:97-CV-0118-G
OFFICER MARK LOCKRIDGE,	*	
	*	
Defendant.	*	

STATEMENT BY FRANK P. HERNANDEZ
TO THE RECORD

I, Frank P. Hernandez, make this statement under penalty of perjury, to the Record in this case.

1. This statement is to supplement the statements made by Frank P. Hernandez in his Appeal To the Chief Judge Under Local Rule 83.8(c).

2. After filing the appeal to the Chief Judge, Frank P. Hernandez, delivered a copy of the petition to Judge Buchmeyer's law clerk and was assured that Judge Buchmeyer would be advised of the urgency and the contents of the petition. Judge Buchmeyer was away from Dallas at the time.

3. Frank P. Hernandez knew that Judge Buchmeyer would be in trial starting Monday, October 20, 1997 through Thursday, October 23, 1997, since Frank P. Hernandez knew the attorneys that were trying the case. In addition he had been advised that Judge Buchmeyer would be out of town at a judicial conference.

4. On Monday, October 27, 1997, Frank P.

Hernandez presented himself in the chambers of Judge Buchmeyer and in a conference with Judge Buchmeyer it was determined that they would meet in his chambers at 2 o'clock p.m. that day. Frank P. Hernandez presented himself at the agreed upon time, but Judge Buchmeyer was detained in his courtroom until a recess at 3:15 p.m., at which time the scheduled meeting occurred.

5. In the meeting in Judge Buchmeyer's chambers Judge Buchmeyer told Frank P. Hernandez that he had not had adequate time to carefully review his appeal and requested that Frank P. Hernandez tell him what had happened. Frank P. Hernandez did so. After hearing what had occurred Judge Buchmeyer told Frank P. Hernandez that after the Noemi Collie case, on which Frank P. Hernandez is the attorney representing Ms. Collie, the judges of the Northern District had agreed that a judge could not suspend or disbar an attorney in the entire district, but only in his court. Frank P. Hernandez pointed out that under Local Rule 83.8(a)(c), Loss of Membership, Frank P. Hernandez was suspended from practicing in the Northern District. Judge Buchmeyer then reviewed the Order entered by Judge Fish on October 7, 1997 and said that it only applied to Judge Fish's court and advised that Judge Fish's use of the wording "...practice before this court" [Order, October 7, 1997, pg. 2] was in keeping with the agreement the judges of the Northern District had made among themselves. With this explanation it was made clear to Frank P. Hernandez that he was only suspended in Judge Fish's court, although the local rules stated otherwise. The meeting concluded with Judge Buchmeyer advising Frank P. Hernandez that he had a scheduled noon meeting the next day with Judge Fish and that he would discuss the matter with at

that time and "get back" to Frank P. Hernandez.

6. In the afternoon of October 28, 1997, Ms. Pam Winger, Judge Buchmeyer's court coordinator, called Frank P. Hernandez and advised him that Judge Buchmeyer was going to deny his appeal. She also advised that Judge Buchmeyer would issue a written order in the near future. She also advised that Judge Fish was aware of the appeal and had indicated to Judge Buchmeyer that he wanted Frank P. Hernandez to call him. Frank P. Hernandez immediately called Judge Fish's office and left word with Judge Fish's secretary about the nature of the call. Judge Fish did not return the call to Frank P. Hernandez. Several days later Frank P. Hernandez called and left word with Judge Fish's office a second time. Judge Fish did not return the call.

7. On October 17, 1997 Frank P. Hernandez corresponded with Ms. Nancy Doherty, the U.S. District Clerk for the Northern District requesting that she determine how the action in her office came about wherein the notice was sent to the wrong attorney, and to provide Frank P. Hernandez with the information so that he could provide it to the Court. [Exhibit 1]. Ms. Nancy Doherty has not responded to the letter from Frank P. Hernandez.

8. As of this date Judge Buchmeyer has not issued a written Order concerning his denial of the appeal.

Signed this 6th day of November, 1997 at Dallas, Texas.

/S/_____
Frank P. Hernandez

Appendix Q - 1

Office of the Attorney General
State of Texas

DAN MORALES
Attorney General

Law Enforcement Defense Division
(512) 463-2089
Fax (512) 495-9139

August 19, 1997

Frank P. Hernandez
Lawyer
716 Wayne Street
Dallas, Texas 75223

RE: Clayton Bryant Caves v.
Officer Mark Lockridge
Civil Action No. 3:97-CV-0118-G

Dear Mr. Hernandez:

Enclosed you will find the original and two copies of the Joint Status Report which I have approved and signed. It is my understanding that you will file this report with the Court prior to August 28th.

Thank you for your assistance.

Yours very truly,

/S/

RICHARD D. NAYLOR
Assistant Attorney General

RDN/ab
Enc.